No. 15,081

IN THE

United States Court of Appeals

For the Ninth Circuit

COY C. GOODRICH,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Northern District of California.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

JURISDICTION.

On May 27, 1954 the appellant filed a petition for an arrangement under Chapter XI of the Bankruptcy Act (Tr. 1-6). The petition was filed pursuant to Section 322 of the Act, 52 *Stat.* 907 (1938), as amended, 11 *U.S.C.* Section 722 (1952), and was referred to Burton J. Wyman, Referee in Bankruptcy (Tr. 10-11), pursuant to Section 331 of the Act, 52 *Stat.* 908 (1938), as amended, 11 *U.S.C.* Section 731 (1952). Thereafter, on June 29, 1954, the appellant petitioned the United States District Court to dismiss the proceedings (Tr. 14-27), which matter was also referred

to the referee. Extensive hearings were held on the appellant's petition to dismiss, and on December 1, 1954 the referee denied the petition to dismiss. (Tr. 76.)

On December 10, 1954, the appellant petitioned to the United States District Court to review the judgment of December 1, 1954. (Tr. 77.) Jurisdiction for that proceeding existed under Section 302 of the Act, 52 *Stat.* 905 (1938), as amended, 11 *U.S.C.* Section 702 (1952), which made applicable the provisions of Sections 2(a)(10), 39(a)(8) and 39(c) of the Act, 30 *Stat.* 545 and 555 (1898), as amended, 11 *U.S.C.* Sections 11 and 67 (1952).

On November 15, 1955 the United States District Court affirmed the referee's order. (Tr. 188.) The appellant filed a notice of appeal on December 13, 1955. (Tr. 189.)

Jurisdiction of this Court is invoked pursuant to Section 316 of the Act, 52 *Stat.* 907 (1938), as amended, 11 *U.S.C.* Section 716 (1952). That section makes applicable to proceedings under Chapter XI the provisions of Section 24, 30 *Stat.* 553 (1898), as amended, 11 *U.S.C.* Section 47 (1952).

OPINION BELOW.

"ORDER AFFIRMING REFEREE'S ORDER

"The facts show, and the Referee was fully justified in finding, that Coy C. Goodrich was in fact and truth the owner of the business and assets of Goodrich Man-

ufacturing Co., and that his wife's interest therein and in and to the assets, real or personal, of said business, was her community interest therein, as his wife, under the laws of the State of California.

"That being so, the description used to designate the identity and status of the petitioner, Coy C. Goodrich in the petition for an arrangement, is immaterial and of no moment.

"In my opinion, therefore, the present proceeding should continue, with or without amendment to the petition, in full accord with the provisions and purposes of the applicable provisions of the statutes.

"The order of the Referee denying the motion to dismiss the proceeding, is affirmed. The cause is remanded to the Referee with directions to proceed with the administration of the estate of Coy C. Goodrich agreeably to the applicable statutes and rules.

Dated: November 14, 1955.

Louis E. Goodman,
United States District Judge."

STATEMENT OF THE CASE.

The appellant executed two contracts for small arms with the Government through the Department of the Army. Contract No. DA 11-07-Ord-6384 awarded on February 29, 1952 (Debtor's Exhibit 2) provided for the delivery of cartridge extractors at a price of $183,863.15 with deliveries commencing January 31, 1952. On June 30, 1952, contract No. DA-19-058-Ord-

7015 (Debtor's Exhibit 3) was awarded. That contract provided for special small arms tools at a total cost of $379,440, and established a delivery schedule beginning November 1952. Due to lack of working capital, the appellant was unable to meet these delivery schedules. To enable completion of the contract, the Government executed Supplemental Agreement No. 2 to contract No. 6384 and Supplemental Agreement No. 1 to contract No. 7015 providing for progress payments. The Supplemental Agreements were essentially identical, permitting the contracting officer to advance funds to the appellant based upon a percentage of work in progress. Paragraph A of the Supplement in each case provided:

> "(A). The contracting officer may, from time to time, authorize progress payments to the contractor . . . and . . . in no event shall the total of unliquidated progress payments . . . and of unliquidated advance payments, if any, made under this contract, exceed 80% of the total contract price of supplies still to be delivered."

Pursuant to these provisions the appellant received $296,836.69 in advance of deliveries under the contract. (Tr. 104.)

It was evident that the appellant was having difficulty completing the contracts. The Government supplied a production engineer to assist appellant. (Tr. 446-447.) The operation of the appellant, however, continued to result in accumulation of unpaid debts and wages, and a continuing threat of judicial process as a method of collection existed.

These factors motivated the Government to refuse to make any further advance payments on the contract since the payment of any progress payments was within the discretion of the contracting officer (Debtor's Exhibits 2 and 3). In addition, the progress payments had already exceeded the maximum amount provided in the supplemental agreements in that more than 80% of the total contract price of supplies still to be delivered had been advanced. Representatives of the Government advised the appellant that if a Chapter XI proceeding were instituted under the Bankruptcy Act, it was their belief that arrangements could be made for further progress payments. However, it is clear that such payments would have required an amendment to the supplemental agreement. And even if the supplement were amended, payment would continue to be in the discretion of the contracting officer. At all times, however, the Government was willing to accept delivery under the contracts. (Testimony of appellant, Tr. 229, and the contracting officer, Tr. 445.)

Appellant, on or about May 20, 1954, consulted Angelo J. Scampini, an attorney, in relation to procedure under Chapter XI of the Bankruptcy Act. (Tr. 46.) Appellant informed his attorney, and August B. Rothschild, another attorney consulted in relation to a Chapter XI proceeding, that Goodrich Manufacturing Co. was owned by himself and Lulu Goodrich. (Tr. 15, 210, 418-9.) Thereafter, the affidavits, schedules and petition were filed with the United States District Court. In each affidavit, schedule, and other accom-

panying document, Coy C. Goodrich and Lulu Goodrich stated that the business was a partnership composed of themselves. (Tr. 1, 5, 6, 27, 29, and 30.) The Goodriches became dissatisfied with their attorneys, replaced them, and filed a petition to dismiss the Chapter XI proceeding. Grounds for this petition were: (1) no partnership existed and (2) the appellants were fraudulently induced to enter into the Chapter XI proceedings by the Government. Extensive hearings were held before the Hon. Burton J. Wyman, Referee in Bankruptcy, at which hearings the Government, various creditors represented by Mr. Frederick J. Schoeneman, an attorney (Tr. 267), and Mr. Gerald L. Tesman, a creditor (Tr. 332), objected to the dismissal.

In an opinion filed December 1, 1954, the Referee in Bankruptcy denied the petition to dismiss the Chapter XI arrangement proceeding. (Tr. 179.) In his findings the Referee stated that the entity was a community copartnership (Tr. 158), that it was for the best interests of the creditors of the appellant that the arrangement proceedings not be dismissed (Tr. 165) and that the Department of the Army did not make false promises or coerce the appellant into petitioning for a Chapter XI arrangement. (Tr. 167-8.)

The Referee's decision was affirmed and modified by the United States District Court in its order dated November 15, 1955. The District Court modified the finding that Goodrich Manufacturing Company, the appellant, was a community copartnership. The Court held that the appellant was operated by Coy C. Good-

rich individually, and that the entire assets of the business were community property under the laws of California.[1] The appeal was taken from this Order.

DESIGNATION OF POINTS.

1. Was it error for the Court to amend the name of the appellant to reflect the true identity of the petitioner?

2. Did the Government have standing to object to the appellant's petition to dismiss the proceedings?

3. Did the Government promise the appellant that additional funds would immediately be forthcoming if the debtor filed a proceeding under Chapter XI of the Bankruptcy Act? If so, do these misrepresentations require a dismissal of the entire proceeding?

SUMMARY OF THE ARGUMENT.

1. The Referee and the District Court had power to correct the name of the petitioner to reflect the true identity of the entity before the Court. The appellant testified that it was his intention to secure an arrangement for the Goodrich Manufacturing Company. The fact that the attorneys erred in labeling the entity

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[1]Although the opinion of the District Court does not expressly state that the Referee's finding is modified, there is no other conclusion. The opinion states that the Goodrich Manufacturing Company was owned by Coy C. Goodrich and that the interest of Goodrich's wife was community property. This is inconsistent with the Referee's findings. The opinion of the District Court, being so explicit in the nature of the entity, serves as a finding of fact, *Yanish v. Barber*, 232 F.2d 939 (9th Cir. 1956), and is reviewable by this Court.

does not prevent correcting that error. Coy C. Goodrich intended to place himself and the Goodrich Manufacturing Company in the arrangement proceeding. The District Court had the power to reflect this intention.

2. The United States had standing to protest the dismissal. In the schedules filed in the arrangement proceeding, the appellant listed the United States as a creditor. This, in itself, would be sufficient to entitle the United States to object to the dismissal. However, also in evidence were the contracts between appellant and the Department of the Army, together with appellant's own statements that he had received money in excess of deliveries under the contracts. Accordingly, the United States was a creditor within the meaning of Section 1 (11) of the Act, 30 *Stat.* 544 (1898), as amended, 11 *U.S.C.* Section 1 (1952).

3. The contention that misrepresentations by the Department of the Army induced filing the Chapter XI proceeding is not a basis for dismissing the proceeding. And, assuming such would be a valid basis for dismissal, no misrepresentations were made.

ARGUMENT.

1. DID THE COURT ERR IN AMENDING THE NAME OF THE PETITIONING DEBTOR.

(a) It is apparent that Coy C. Goodrich intended to place the entity which was performing government contracts into the arrangement proceeding. The petition filed on May 27, 1954, and the accompanying

schedules, permits no other conclusion. The petition stated that the debtor was performing two contracts for the Department of the Army. (Tr. 2.) The schedule of assets and liabilities (Tr. 5) were the assets and liabilities of the Goodrich Manufacturing Company. The statement of affairs and accompanying schedules (Tr. 104-15) were the affairs and schedules of the Goodrich Manufacturing Company. This was the petitioning entity. To recognize that any other debtor had petitioned and accompanied the petition with these schedules of debts and assets, would be to accuse Coy C. Goodrich of filing false and fraudulent papers with the United States District Court.

The appellant did not choose the legal classification attached to his business in the petition. When asked who owned the Goodrich Manufacturing Company and the real property, Coy C. Goodrich advised his attorney that it was owned by himself and his wife. (Tr. 46.) When asked who owns the property and the business, Coy C. Goodrich replied, "My wife and I." (Tr. 378.) And, when further questioned concerning the operation of the business, he replied that it was conducted as "community property." (Tr. 378.) It was the attorney who characterized the business as a partnership. It was the attorney's intention to place the entity which had the contracts with the Department of the Army, into the arrangement proceeding. With this intention, he prepared the documents and secured the signatures of Coy C. Goodrich and Lulu Goodrich.

The testimony supports the conclusion that the petitioner was the Goodrich Manufacturing Co., a sole

proprietorship. The assets stated as the assets of the petitioning debtor were the individual assets of Coy C. Goodrich. (Tr. 203.) The contract listed as an asset of the petitioning debtor was the contract of Coy C. Goodrich individually. (Tr. 204.) In response to questions concerning the petition, Coy C. Goodrich gave the following answers (Tr. 204-6):

"Question: Would you state whether or not the allegations and the facts set forth in the documents we have already referred to were intended by you at the time you filed those documents to be statements of you as an individual and regarding your individual proprietorship?

Answer: Well, at the time I considered myself the only one that was doing it.

Question: Thus, you intended to make these statements regarding your individual proprietorship and on behalf of your individual proprietorship. Is that correct?

Answer: Yes.

Question: So, Mr. Goodrich, when you filed your petition on May 27, 1954, it was your intention to bring Goodrich Manufacturing Company as your individual proprietorship before the Court. Is that correct?

Answer: Yes.

Question: Would you state whether or not it was your intention at that time to have the Court act upon your individual debts and liabilities and executory contracts?

Answer: Yes."

Coy C. Goodrich and his attorney both intended to place the operating organization of Goodrich Manufacturing Company before the Court. This being so, and the Court having jurisdiction over the entity, the Court has the power to correct the pleadings to reflect the true name of the party.

Randolph v. Barrett, 41 U.S. 138 (1842);

Nelson v. Jadrijevics, 59 F.2d 25 (5th Cir. 1932);

Salyer v. Consolidation Coal Co., 246 Fed. 794 (6th Cir. 1918);

St. Louis and S.F. Ry. v. Herr, 193 Fed. 950 (5th Cir. 1912);

Hernan v. American Bridge Co., 167 Fed. 930 (6th Cir. 1909);

McDonald v. Nebraska, 101 Fed. 171 (8th Cir. 1900);

Tibbs v. Parrott, 23 Fed. Cas. 1196 (D.C. Cir. 1804);

Evans v. Thompson, 121 F. Supp. 46 (W.D. Ark. 1954);

Browder v. Cook, 59 F. Supp. 225 (D. Idaho 1944);

In re Young, 223 Fed. 659 (D. Mass. 1915);

In re Richardson, 192 Fed. 50 (D. Mass. 1911).

Thus, in *Evans v. Thompson,* 121 F. Supp. 46 (W.D. Ark. 1954), the Court permitted an amendment to show that the defendant was not an individual, but was a partnership, and permitted amending the name of the defendant to include the remaining partners of the partnership. And in *Nelson v. Jadrijevics,* 59 F.2d

25 (5th Cir. 1932), the Court permitted amending the defendant's name to show that the defendant was a sole proprietorship and not a corporation as originally named. The basis for this decision was that the issue was whether the party was before the Court. Similarly, in *In re Young,* 223 Fed. 659 (D. Mass. 1915), the name of the partnership was dropped from the defendant's description, and the action was continued against a named partner alone. In *Salyer v. Consolidation Coal Company,* 246 Fed. 794 (6th Cir. 1918), the Court permitted the plaintiff to amend and substitute a new plaintiff where the original plaintiff had no capacity to institute the action. Similarly, in *McDonald v. State of Nebraska,* 101 Fed. 171 (8th Cir. 1900), the plaintiff was allowed to substitute a new party plaintiff by amendment.

The issue in the above cases was whether the party brought in by the amendment was before the Court under the original pleading. If so, the amendments were allowed without exception. The present petition was filed with the intention that the entity consisting of the Goodrich Manufacturing Company would proceed by arrangement. It was only through the attorney's error that the entity was labeled a partnership. Under these circumstances, there is no doubt that the Court had the power to amend the pleadings to reflect the true identity of the petitioner.

(b) If the petition must be considered the petition of a partnership, then the Court has power to amend the designation of the petitioner. Although section 5 of the Bankruptcy Act, 30 *Stat.* 547 (1898), as amended,

11 *U.S.C.* Sec. 23 (1952), recognizes the existence of a partnership entity for some purposes, that section does not eliminate the common law concept of the partnership. The partnership is composed of the individual partners. Jurisdiction over the partnership is jurisdiction over the individual partners.

Francis v. McNeal, 228 U.S. 695 (1913).

In *Francis v. McNeal* the Court held that jurisdiction over the partnership was also jurisdiction over the estates of the individual partners, stating:

> "But we do not perceive that the clause imports that the partnership could be in bankruptcy and the partners not."
>
> *Francis v. McNeal,* 228 U.S. 695, 701 (1913).

The common law concept of the partnership was not rejected in *Liberty National Bank of Roanoke v. Bear,* 276 U.S. 215 (1928). The meaning of that decision, as stated by the Court, is that an adjudication of bankruptcy of the partnership is not an adjudication of the individuals.

This Court recognized the limitation of *Liberty National Bank of Roanoke v. Bear,* supra. In *Mason v. Mitchell,* 135 F.2d 599 (9th Cir. 1943) this Court stated:

> "First, the legal fiction of separate entity as applied to corporations or partnerships is purely a linguistic device utilized for conceptual convenience. It is not a premise to be reasoned from, but merely a shorthand statement of a conclusion. Thus, though the Supreme Court or the statute may in effect treat a partnership as an 'entity'

> for some purpose, such treatment alone in no way aids in the solution of the problem. . . . Further, in answer to appellant's argument that Section 5 subs. (a) and (b) establish congressional adoption of the 'entity' theory, it may be pointed out that in Section 5, subs. (c), (i), and (j) are as clearly predicated upon the 'aggregate' theory. Therefore, it is apparent that these aspects of the statute do not provide a solution to the question . . ."
>
> *Mason v. Mitchell,* 135 F.2d 599, 600-01 (9th Cir. 1943).

The import of the decisions in *Francis v. McNeal,* 228 U.S. 695 (1913) and *Mason v. Mitchell,* 135 F.2d 599 (9th Cir. 1943), is that jurisdiction over the partnership gives the Court jurisdiction over the individual partners. Jurisdiction over the alleged partnership of Coy C. Goodrich and Lulu Goodrich in the Goodrich Manufacturing Company, placed the individuals within the jurisdiction of the District Court. The Court, therefore, had power to amend the petition to reflect the true identity of the parties who had voluntarily appeared before the Court. See *In re Richardson,* 192 Fed. 50 (D. Mass. 1911).

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2. THE APPELLANT HAS NO ABSOLUTE RIGHT TO DISMISS THE PETITION.

Although no procedure is established for dismissing a petition, either in bankruptcy or for an arrangement, General Order 37, 11 *U.S.C.* following Section

53 (1952), makes the Federal Rules of Civil Procedure applicable "in proceedings under the Act" unless "inconsistent" with the Act.

Rule 41 of the Federal Rules of Civil Procedure permits a dismissal without an order of the Court if no pleading has been filed by an adverse party. Thus, dismissal under the Federal Rules, would be a matter of right. However, Section 59(g) of the Act, 30 *Stat.* 561 (1898), as amended, 11 *U.S.C.* Section 95(g) (1952), permits dismissal only upon notice to creditors. Rule 41 is thus, inconsistent, and inapplicable. The petitioner must show a right to a dismissal. Accordingly, dismissal under the Bankruptcy Act is within the discretion of the Court.

In re Thorpe, 12 F.2d 775 (7th Cir. 1926);

In re Browne, 30 F.Supp. 157 (E.D.N.Y. 1939);

In re Sullivan, 23 F.Supp. 142 (N.D. Ga. 1938).

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3. THE GOVERNMENT HAD STANDING TO OBJECT TO DISMISSAL OF THE PROCEEDINGS.

The appellant concedes that if the Government is a creditor of the debtor, then the Government has standing to object to the dismissal of the petition. It is the position of the appellee that status as a creditor is sufficiently established through one of three means: (1) By the debtors listing the Department of the Army as a creditor in his schedules (Tr. 101 and 104); (2) the Government is a creditor within the

meaning of Sections 302 and 307 of the Bankruptcy Act, 52 *Stat.* 905 and 906 (1938), as amended, 11 *U.S.C.* Sections 702 and 707 (1952); or (3) the Government is a creditor by virtue of the taxes due and unpaid. (Tr. 101 and 104.)

(a) Listing the Government as a creditor provides standing to object. No specific procedure is provided for dismissal of an arrangement. Section 59 of the Act, 30 *Stat.* 561 (1898), as amended, 11 *U.S.C.* Section 95 (1952), which is made applicable by Section 302 of Chapter XI of the Act, 52 *Stat.* 905 (1938), as amended, 11 *U.S.C.* Section 702 (1952), assumes that a petition to dismiss may be filed. Section 59(g) provides in part:

> "A voluntary . . . petition shall not be dismissed upon the application of the petitioner or petitioners . . . until after notice to the creditors . . ."

Since the petition may be filed prior to any meeting of persons claiming to be creditors, the reference to creditors in Section 59 must refer to those persons listed by the debtor. Otherwise, there would be no method of determining to whom notice should be sent.

Also, listing of a creditor should conclusively establish standing to object to the dismissal for another reason. If the Court were required to determine who is a creditor, the hearing on the petition to dismiss would become a summary proceeding to determine the validity of creditors' claims. Such procedure would cause excessive delay, and would not adhere to the purpose of the Act to facilitate expeditious handling of the estate.

(b) The Government is a creditor within the meaning of Sections 1(11) and 307 of the Bankruptcy Act.

(1) *Section 307.* If the arrangement plan provides for an extension of time for payment of debts, Section 307 of the Act creates a broad definition of creditors. That section provides as follows:

> "(1) Creditors shall include the holders of all unsecured debts, demands, or claims of whatever character against a debtor, whether or not provable as debts under Section 63 of the Act, and whether liquidated or unliquidated, fixed or contingent; and
>
> "(2) Debts or claims shall include all unsecured debts, demands, or claims of whatever character against a debtor, whether or not provable as debts under Section 63 of the Act and whether liquidated or unliquidated, fixed or contingent."
>
> 52 *Stat.* 906 (1938), as amended, 11 *U.S.C.* Section 707 (1952).

There can be no doubt that the advance payment by the Government to the appellant pursuant to the provisions of the contract were an unliquidated contingent claim. As such the Government became a creditor within the meaning of Section 307.

(2) *Section 1(11).* If the arrangement contemplates a composition, then the definition of a creditor is narrower. Section 302, 52 *Stat.* 905 (1938), as amended, 11 *U.S.C.* Section 702 (1952), makes applicable the definitions of Section 1 of the Act. Section 1 provides:

"(11) Creditor shall include anyone who owes a debt, demand, or claim provable in bankruptcy and may include his duly authorized agent, attorney, or proxy."

30 *Stat.* 544 (1898), as amended, 11 *U.S.C.* Section 1(11) (1952).

Section 63 of the Act provides that debts may be proved which are contingent and founded upon express or implied contractual liabilities. 30 *Stat.* 562 (1898), as amended, 11 *U.S.C.* Section 103(4) and (8) (1952). The Government's claim being based upon advance payments made pursuant to the contracts with the appellant, are debts founded upon either "a contract express or implied" or contingent contractual liabilities. As such, they are provable within the meaning of Section 63 of the Bankruptcy Act, and the Government is a creditor within the meaning of Section 1 (11) of the Act.

(c) Disregarding the claim under the contracts, the Government is a creditor by virtue of taxes due and owing. The appellant listed unpaid taxes as a debt due. (Tr. 101, 104.) Debts arising from unpaid taxes are provable within the meaning of Section 63.

Ingels v. Boteler, 100 F.2d 915 (9th Cir. 1938), aff'd 308 U.S. 57.

In any event, it would seem immaterial whether the Government was a creditor of the appellant, since another creditor of the appellant objected to the dismissal. The testimony of Gerald L. Tesman was as follows (Tr. 332):

"Question: Did you authorize Mr. Schoeneman to come into court on your behalf and oppose Mr. and Mrs. Goodrich's aplication to dismiss this proceeding?

Answer: I did."

Mr. Schoeneman made his client's objection to the dismissal known to the Court. (Tr. 267.)

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4. THE GOVERNMENT DID NOT FRAUDULENTLY INDUCE THE APPELLANT TO FILE THE PETITION FOR ARRANGEMENT.

Assuming representations were made, they are not grounds to dismiss the proceeding.

(a) The referee found that no coercion existed, nor were there misrepresentations made by the Government with the intent to induce filing the Chapter XI petition. (Tr. 166-168.) This finding must be affirmed unless clearly erroneous.

General Order in Bankruptcy 47, 11 *U.S.C.* following § 53 (1952).

There was no coercion. At no time prior to filing the petition did the Department of the Army refuse to accept performance under the contract. As stated by the contracting officer (Tr. 445):

"Question: Are both the contracts in full force and effect?

Answer: Both in full force and effect.

* * * * * * *

Question: Were there any shipping instructions in that letter?

Answer: No, there were no shipping instructions in that letter. The contracts were in full

force and effect. The Government stood ready to furnish inspectors to inspect and accept wrenches offered."

And the testimony of Coy C. Goodrich is to the same effect (Tr. 229):

"Question: But you were informed that even if you did not get under Chapter XI, they would accept physical delivery of the items for whatever credit they would be worth. They would be accepted. Is that right?

Answer: Yes."

The Government did not promise to supply working capital to perform the contracts if a Chapter XI proceeding were initiated. On cross-examination, Coy C. Goodrich admitted that there was no promise that money would be forthcoming. (Tr. 228.) He stated that the Government officials informed him that the money *could* be paid. And the affidavit of Goodrich's attorney, A. J. Scampini, further affirms that discussions as to available funds were in the preliminary negotiation stage. (Tr. 56.) The affidavit indicates (Tr. 57) that the first agreement concerning money was reached on June 8, 1954, and the agreement was that funds would be made available from time to time. This agreement was reached subsequent to the filing of the petition of May 24, 1957, and accordingly, could not be an inducement to file.

The true situation is apparent. The Government was concerned over performance of the contracts. However, it hesitated to advance any further funds, in view of the appellant's financial difficulties. Repre-

sentatives of the Government no doubt stated that if a Chapter XI proceeding were instituted to protect further advances, then it might be possible to arrange for progress payments in excess of the amounts limited by the written contract. However, no promise to make funds available was ever made. This is the conclusion drawn by the referee, and the conclusion supported by the evidence.

(b) The alleged misrepresentations are no grounds for a dismissal. The appellant was aware of the documents being filed, and the type of proceeding being initiated. The mistakes or misrepresentations were extraneous to the arrangement proceeding. The appellant knowingly invoked the jurisdiction of the Court and instituted the arrangement proceeding. In *Gersing v. Shinberg,* 140 F.2d 706 (D.C. Cir. 1944), the petitioners moved to dismiss a voluntary bankruptcy petition on the grounds that they were tricked into filing the petition, and that therefore their filing was not in good faith. The Court refused to dismiss the petition. And, in *In re Epstein,* 12 F.Supp. 450 (E.D.N.Y. 1935), the petitioner was induced to file by a mistake as to the effect of the discharge awarded him. The Court refused to dismiss the petition on grounds of any mistake.

Similar to the instant case is *Guterman v. Parker and Company,* 86 F.2d 546 (1st Cir. 1936), cert. denied, 300 U.S. 677. In that case the allegation was made that the petition was induced by attempts of an attorney to gain fees in bankruptcy. The petition was not dismissed, since those matters do not affect the in-

tegrity of the petition. And in *In re Weare,* 87 F. Supp. 413 (S.D.N.Y. 1949), the bankrupt attempted to dismiss the petition on the grounds that he believed he could retain certain funds. The Court denied the motion to dismiss. See also *In re Browne,* 30 F.Supp. 157 (E.D.N.Y. 1939).

The import of these decisions is clear. Where the fraud or misrepresentation is fraud or misrepresentation in the inducement—the motive for filing the petition—it will have no effect upon the petition's validity. The referee recognized this principle. Accordingly, he excluded evidence tending to show promises and representations to the appellant. He was aware of facts which enabled him to determine the nature of the fraud which the appellant complained of. Such fraud was no basis for dismissal, and the referee and District Court so held.

CONCLUSION.

There was no error in amending the petition to reflect the true identity of the petitioner. Nor, was there any error in refusing to dismiss the petition. The decision of the District Court should be affirmed.

Dated, June 19, 1957.

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